Filed 3/17/09 P. v. McIntyre CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. GENE MCINTYRE, Defendant and Appellant.	2d Crim. No. B203982 (Super. Ct. No. BA314598) (Los Angeles County)

Gene McIntrye appeals a judgment following his conviction of furnishing or transporting cocaine base (Health & Saf. Code, § 11352, subd. (a)) and possession for sale of cocaine base (*id.*, § 11351.5). In a separate court trial after the jury verdicts, the trial court found the allegation that McIntyre had six prior drug-related felony convictions (*id.*, § 11370.2, subd. (a)), between 1989 and 2003, to be true. The court sentenced him to an aggregate state prison term of 21 years 4 months.

We conclude, among other things, that: 1) the trial court did not err by allowing the police to assert a surveillance location privilege, 2) it did not abuse its discretion by not allowing a codefendant to testify about a statement made by a third party, 3) it did not err by denying a mistrial motion, 4) it could reasonably find that McIntyre's offer of proof was insufficient to establish a third party culpability theory, 5) substantial evidence supports the court's finding that he had six prior convictions, but 6)

the abstract of judgment does not accurately reflect McIntyre's presentence custody credits. The abstract must be modified. In all other respects, we affirm.

FACTS

Police officer Thomas Brown was a member of a narcotics unit which focused on street dealers. They set up hidden observation posts in areas of Los Angeles where there is substantial narcotics activity.

On December 7, 2006, from his observation post, Brown saw several people go in and out of a small tent someone had erected on a sidewalk. He saw a transaction where one woman gave money to another lady for an "off-white solid" which appeared to be rock cocaine. Brown said he had a clear view of that transaction and of the inside of the tent. Police officers arrested the women. They searched the tent and the area outside the tent. They found currency, a glass cocaine pipe, and "off-white solids" in a cigarette pack which was located in a backpack which they found inside the tent.

A half-hour later, Brown saw McIntrye yelling at Melvin Emilien. The two of them walked to the tent. Emilien went inside the tent and rummaged through items, came out and talked with McIntrye. McIntyre walked away.

A few minutes later, from his surveillance location, Brown saw Emilien approach McIntyre. McIntyre handed Emilien clear plastic bags containing "off white solids." Brown testified that it was a sunny day, there were no trees or anything else to interfere with his view of this transaction. He was 60 to 70 feet away from McIntyre and he was using binoculars.

The police detained and searched Emilien. They seized two plastic bags. Theses bags contained "3.04 net grams of cocaine in the form of cocaine base."

The police searched McIntyre. He had $2,000 in cash and a set of keys. Brown had seen the car that McIntyre drove into this neighborhood. Using the set of keys the police confiscated from McIntyre, Brown and another officer entered that vehicle and searched it. They found a Bank of America checkbook. The printed checks in that checkbook showed McIntyre's name and listed his address as 1425 South Bronson Avenue, apartment No. 7.

Brown went to that address. Using the keys the police seized from McIntyre, Brown opened the dead bolt and knob locks to the door of apartment No. 7. In a search of that apartment, police found "a glass Pyrex pan with some off-white residue," a "glass beaker with off-white residue," clear plastic bags "containing off-white solids consistent with" rock cocaine, and an electronic scale. Brown opined that the large quantity of drugs the police seized indicated that they "were possessed for sale," and that McIntyre had given drugs to Emilien "so that he could sell them."

In the defense case, Emilien testified that he saw police officers arrest Dorothy Spearman. She was the woman in the tent who had sold drugs to the other lady. The police arrested both women. Emilien saw the police go through Spearman's belongings and seize crack cocaine.

After the police left, Emilien went into the tent and rummaged through Spearman's belongings, some of which the police had left on the sidewalk. Emilien testified that "when [he] was picking up her stuff off the sidewalk and when [he] put it back in the tent, two bundles of packs of cocaine fell out." Emilien put them in his pockets. McIntyre never gave him any drugs.

Larry Anderson testified that he was the manager of a company that manages 20 buildings, including the apartments located at 1425 South Bronson Avenue. He said Cynthia McIntyre is listed as the lessee on the lease agreement for apartment No. 7. Anderson did not know who was staying in apartment No. 7 on December 7, 2006.

DISCUSSION

I. *The Surveillance Location Privilege*

McIntyre contends the trial court erred by allowing the police to refuse to disclose the location of Brown's surveillance site. He claims the court should have struck Officer Brown's testimony because the location of that site was material to his defense. We disagree.

The police often use surveillance sites to spot drug transactions. They are interested in maintaining the secrecy of these locations to monitor criminal activity on the

streets. At the same time defendants are entitled to discovery and to question the police officer's ability to accurately see and identify criminal activity. The doctrine known as the surveillance location privilege was created to balance these competing interests. (Evid. Code, §§ 1040-1042.)

Under this doctrine, "[t]he government has a privilege to refuse to disclose the exact location of a surveillance site if the public interest in preserving the confidentiality of that information outweighs the need for disclosure." (*People v. Haider* (1995) 34 Cal.App.4th 661, 664.) The trial court determines whether the site should be disclosed after hearing testimony from the police officer at an in camera hearing. (*Id*. at p. 666.) If the court finds that a surveillance site is privileged, it will either strike the officer's surveillance testimony or "make a finding adverse to the prosecution *if the location is material to the defense*." (*Id.* at p. 665, italics added; see also *id.* at p. 669.) But the site will not be deemed material to the defense if "the record of the in camera hearing and the trial" establishes that the police officer "had an unobstructed view of the drug transaction . . . ." (*Id.* at p. 669.)

Here the trial court held an Evidence Code section 402 hearing. Officer Brown testified that he was asserting the privilege under Evidence Code section 1040 not to disclose the police surveillance site from which he observed the drug activities. He said he was doing this for the "[g]eneral safety for persons who occupy that location . . . ." This included property owners who had been threatened and feared retaliation for their cooperation with the police. To his knowledge, this location has remained secret and "has never been disclosed" to the public.

Brown said the site was 30 to 40 feet above the ground and he had observed McIntyre about 3:00 o'clock in the afternoon through a "pane glass window" which was roughly "five feet by three feet." It was a sunny day, there were no clouds in the sky and he was using binoculars. Brown said when he initially saw McIntyre he was 50 to 60 feet away. McIntyre was about 75 to 80 feet away from him when Brown saw him "hand off" the "plastic baggie containing an off-white substance." At the time Brown was looking

"straight at them." He said there were "no trees or poles or anything in between [his] location and theirs." There was no traffic to obstruct his view.

The trial court subsequently held an in camera hearing. We have reviewed the in camera transcript.

The evidence at the Evidence Code section 402 hearing, the in camera hearing, and at trial established that Brown had an unobstructed view of McIntyre from his surveillance site. Brown was subject to extensive cross-examination. There were adequate grounds to sustain the privilege and the "officer's refusal to disclose the exact location of the surveillance site did not deprive appellant of a fair trial." (*People v. Haider*, *supra*, 34 Cal.App.4th at p. 669.) We conclude that there was no abuse of discretion by the trial court.

II. *Excluding Spearman's Statement*

McIntyre contends that the trial court erred by not allowing codefendant Emilien to testify that while he and Spearman were in custody, Spearman asked him, "Did you find my drugs?" We disagree.

Counsel for codefendant Emilien made the following offer of proof. He said Emilien would testify that "the drugs that were found on [him were] not, in fact, given to him by Mr. McIntyre but actually were found within the tent that is owned by [Spearman,] a woman who had just been arrested for possession for sale." Emilien found "Spearman's drugs" in her tent. When he was later arrested with those drugs and placed in the same patrol car as Spearman, she asked him the question about her drugs.

The prosecutor said that Spearman could not be called as a witness because she had invoked her Fifth Amendment right not to incriminate herself. There was no other evidence to support the claim that she had asked that question other than Emilien's testimony.

The court found that Spearman's statement should be excluded under Evidence Code section 352. It found that "because of issues of location and timing, . . . such evidence will distract the jury and confuse them in view of who did what, where, when, [and] how."

A trial court has broad discretion in applying Evidence Code section 352 in deciding the admissibility of evidence. (*People v. Jackson* (1985) 174 Cal.App.3d 260, 266.) It may exclude evidence where its probative value is substantially outweighed by the risk that its admission may confuse the jury. (Evid. Code, § 352.)

Here the court was properly concerned about the ambiguity of Spearman's remarks. Her five-word question, "Did you find my drugs?" does not identify the time period or the batch of drugs to which she was referring. As the Attorney General notes, she had been arrested, the police searched her tent and the prosecution claimed that the police had seized her drugs. But Emilien claimed he later came into her tent and found additional drugs. Jurors could be left to speculate whether Spearman was referring to the drugs which the police confiscated or to the drugs Emilien claimed he later found. Or they might have to speculate about whether Spearman was suggesting that she had anticipated that the police would be unable to find all her drugs after a search and that Emilien would find them.

But even if the trial court had erred, the result does not change. The defense intended to present Spearman's statement through Emilien's testimony. At trial Emilien testified that he went to Spearman's tent after the police arrested her. He went through her belongings and "two bundles of packs of cocaine fell out." He said he put those bundles in his pockets. But the jury did not find Emilien to be credible. It rejected his claim that he did not obtain the drugs from McIntrye.

Moreover, Emilien also testified that he had never sold drugs. But he was impeached by his prior conviction for transporting and selling a controlled substance. Where the jury has rejected the defense theory and disbelieves its main witness, the erroneous exclusion of collateral evidence in support of the rejected defense theory does not constitute prejudicial error. (*People v. Jackson*, *supra*, 174 Cal.App.3d at p. 267.) McIntyre has not shown that the result would change had Emilien testified about Spearman's question.

III. *The Mistrial Motion*

McIntyre contends the court erred by denying his motion for a mistrial after a prosecution witness mentioned that he was on parole. We disagree.

During cross-examination, McIntyre's trial counsel asked Officer Brown, "Mr. McIntyre told you he lived in Lomita, California, correct?" Brown responded, "Yes. He said that is where he reports to his parole officer."

McIntrye moved for a mistrial. The court denied the motion, but it admonished the jury, "Ladies and gentlemen, the last answer in its entirety is stricken and must be disregarded by you."

McIntyre contends that the only alternative was for the court to have granted a mistrial. But "[a] mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction." (*People v. Haskett* (1982) 30 Cal.3d 841, 854.) "Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions." (*Ibid*.)

Here the court admonished the jury to disregard the answer. "A jury is presumed to have followed an admonition to disregard improper evidence particularly where there is an absence of bad faith." (*People v. Allen* (1978) 77 Cal.App.3d 924, 934.) "It is only in the exceptional case that 'the improper subject matter is of such a character that its effect . . . cannot be removed by the court's admonitions.'" (*Id*. at p. 935.)

McIntyre claims Brown deliberately injected the parole status response and acted improperly as a law enforcement witness. But the trial court did not find that he acted in bad faith. It suggested that the defense line of questioning had led Brown to give this answer. The court said, "In the context of the questions that were asked, it might seem to a reasonable person that it might have opened the door." This line of questioning involved statements that McIntrye made to the police. Prior to the question about living in Lomita, McIntyre's counsel had asked Brown, "When Mr. McIntyre was arrested and you asked him where he lived, what did he tell you?" The trial court decided that Brown

had not gratuitously injected his response. Brown had simply responded by repeating what McIntyre had said to him.

Moreover, McIntyre has not shown prejudicial error. Given the strength of the prosecution's case and the weakness of the defense case, there is no reasonable possibility that the result would be different had Brown not made this remark.

IV. *Cynthia McIntyre's "Rap" Sheet*

McIntyre contends the trial court erred by not ordering the prosecution to produce the rap sheet of his sister, Cynthia McIntyre. He claims this denied him a fair trial by preventing him from advancing a third party culpability theory which would show that his sister possessed the drugs at the Bronson Avenue apartment. We disagree.

"[T]he prosecution is required to disclose the felony convictions of all material prosecution witnesses . . . ." (*People v. Little* (1997) 59 Cal.App.4th 426, 434.) But Cynthia McIntyre was not a prosecution witness. The trial court denied the defense request for the prosecution to turn over her rap sheet after listening to the defense's offer of proof, and after McIntyre's trial counsel indicated that he would not be calling Cynthia McIntyre as a witness.

In his offer of proof, McIntyre claimed that his sister's rap sheet would disclose her drug convictions. He noted that she was listed as the lessee on the lease to apartment the police had searched. His sister's status as the lessee would link her to the real estate. But the offer of proof was insufficient. To establish his third party culpability theory, McIntyre had to show "direct or circumstantial evidence *linking the third person to the actual perpetration of the crime*." (*People v. Hall* (1986) 41 Cal.3d 826, 833, italics added.)

But McIntyre did not show that Cynthia McIntyre was residing at the apartment at the time the police searched it. He did not show that she had been living there or that she had a connection to the drugs the police found. The offer of proof did not include any claim that she had a connection to Emilien or the location where the drug exchange took place. An offer of proof for third party culpability may not be based on

speculation or "mere motive or opportunity to commit the crime in another person." (*People v. Hall*, *supra*, 41 Cal.3d at p. 833.)

Moreover, the prosecution presented compelling evidence showing that McIntyre resided at the apartment where the drugs were seized, and that his sister did not live there. Brown testified that the manager of the apartment house identified McIntyre from a photograph and said that he lived there. Brown saw mail addressed to McIntyre at the address of the apartment. The detective who searched the apartment saw only "male clothing," no "female hygiene product[s]," and it appeared "that only a male was residing at the location." In addition, when the police searched McIntyre's car, they found a Bank of America checkbook listing McIntyre's name and the address of the Bronson Avenue apartment. The keys on McIntyre's key chain opened the door to that apartment.

V. *The Prior Convictions*

McIntyre contends there is insufficient evidence to support the trial court's finding that he suffered six prior convictions. He claims there is no evidence to establish that he is the same person who was convicted of these priors. We disagree.

In reviewing the sufficiency of the evidence, we draw all reasonable inferences in support of the judgment and we do not weigh the evidence. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 10-12.) Here there was a court trial on McIntyre's priors. The prosecutor introduced certified court records to prove the six prior convictions.

A. *Identity Evidence*

McIntyre notes that in the certified records of his prior convictions, there was fingerprint evidence. He argues that the prosecutor failed to present adequate proof because she did not call a fingerprint expert to testify whether those prints matched McIntyre's. But fingerprint evidence is not the only method of proving identity. The records the prosecution introduced contained photographs of McIntyre. McIntyre has not shown why a court may not compare those photographs to the defendant in the courtroom and draw the inference that it is the same person. (*People v. Sarnblad* (1972) 26 Cal.App.3d 801, 806 ["photographic . . . evidence may be utilized to prove priors . . . ."].)

In addition, here all the prior convictions were for Gene McIntyre. "[I]n the absence of countervailing evidence, . . . *identity of person may be presumed, or inferred, from identity of name*." (*People v. Mendoza* (1986) 183 Cal.App.3d 390, 401.) McIntyre did not present any countervailing evidence at trial to show that another person using the same name committed these offenses. (*Ibid.*) Moreover, when the prosecutor introduced four certified abstracts of judgment for the convictions of Gene McIntyre between 1989 and 1997, McIntyre's counsel did not object, nor did he claim that they involved another person. McIntyre has not shown the lack of sufficient identity evidence.

B. *The Computer-Generated Printouts of the Dockets*

McIntyre contends that the court erred by admitting two computer-generated docket printouts of his two most recent prior convictions. We disagree. A computer-generated official court record is admissible to prove a prior conviction. (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1460.) Here these two court records contained a certification by the superior court clerk who stated, "I hereby certify this to be a true and correct copy of the electronic docket on file in this office as of the above date."

Many years ago the criminal docket was a written chronology of the case history, but now it is maintained as a computer record. In both cases the docket is maintained by court clerks. California court clerks have a duty to accurately report and document criminal record history. (*People v. Martinez* (2000) 22 Cal.4th 106, 126.) "'[I]t is presumed that official duty has been regularly performed.'" (*Id*. at p. 125.) This presumption applies to the official actions of court clerks. (*Ibid.*) Here the prosecution did not merely introduce a computer printout, it presented the complete officially certified electronically recorded docket for these two criminal cases.

McIntyre notes that the docket contained only one clerk certification. He argues that there must be a contemporaneous clerk certification for each entry made on the docket by each clerk who imputed information throughout the history of the case. He claims the docket is inadmissible absent these certifications. Although McIntyre objected to the introduction of these records, at trial he did not raise the same issue he is now

raising. Instead, he essentially claimed that dockets generally are unreliable as proof of a conviction, and only an abstract of judgment would suffice.

Although the certified copy of the abstract of judgment is generally used to prove a prior conviction, other court records, including the docket, may also be utilized. (*People v. Henley* (1999) 72 Cal.App.4th 555, 560; *People v. Crockett* (1990) 222 Cal.App.3d 258, 266.) On appeal, McIntyre now concedes that "[c]ourt docket sheets have been admitted to prove various aspects of a criminal history." He claims, however, that computer-generated court dockets are different.

But computer-generated court dockets are maintained by the same court personnel acting under a public duty, and that is the critical factor as to reliability. As the Attorney General notes, the courts presume that the court clerks who make these entries regularly performed their duties to timely and accurately record each event during the progress of the criminal case. (*People v. Martinez, supra*, 22 Cal.4th at pp. 126-127; *People v. Dunlap* (1993) 18 Cal.App.4th 1468, 1479; *Worsley v. Municipal Court* (1981) 122 Cal.App.3d 409, 415 ['"There [remains] a presumption that in preparing the docket entry official duty . . . was regularly performed . . . .' Therefore '". . . such an entry must ordinarily be deemed to speak the truth"'"].) Consequently the docket is admissible and reliable evidence about what occurred in a criminal case. (*Worsley*, at p. 415.) Moreover, the procedure the prosecutor used of certifying this record was not substantially different than the procedure used decades ago of obtaining a certified copy of the complete written docket.

Of course, then as now, clerks who make docket entries may err. But this possibility should not be confused with the issue of whether these official documents are admissible as evidence. "[A]lthough mistakes can occur, "'such matters . . . should not affect the admissibility of the [record] itself."'" (*People v. Martinez*, *supra*, 22 Cal.4th at p. 132.) "[O]ur courts have refused to require, as a prerequisite to admission of computer records, testimony on the 'acceptability, accuracy, maintenance, and reliability of . . . computer hardware and software.'" (*Ibid.*) Where an official certified court record is

admitted as evidence, it comes with a presumption of regularity. The defendant has the burden to demonstrate that it is not accurate. (*Id.* at p. 125.)

Here McIntyre presented no evidence to show that the convictions reflected in these court records were incorrect. He did not present any proof that any docket entries were inaccurate or incomplete. He did not testify, call any witnesses or introduce any documents. The evidence is sufficient.

VI. *Presentence Custody Credits*

McIntyre notes that the abstract of judgment reflects that he is entitled to 336 days of actual presentence custody credit. He states that this is incorrect and that he is actually entitled to 337 days of credit. The Attorney General agrees. The abstract of judgment must be corrected to give McIntyre an additional day of presentence custody credit. (*People v. Acosta* (1996) 48 Cal.App.4th 411, 428.)

We have reviewed McIntyre's remaining contentions and conclude that he has not shown any other reversible error.

The abstract of judgment is ordered modified to reflect 337 days of actual presentence custody credit. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

COFFEE, J.

Michael E. Pastor, Judge

Superior Court County of Los Angeles

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